* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **C.M (M) No. 420/2003**

% Date of Decision: 5th , November, 2007

\# **Sudhir Chona(since deceased) through LRs.** ...Petitioners

! Through Ms. C.M.Chopra, Sr. Advocate with Mr. Sunil Mittal, Advocate

versus

$ **Central Bank of India & Ors.** ..... Respondents

^ Through Mr. Yogesh Pachauri, Advocate for respondent no. 1.

Mr. A.S. Dateer, Advocate for LRs of respondent no. 3.

CORAM:

* **HON'BLE MR. JUSTICE P.K.BHASIN**

1. Whether Reporters of local papers may be allowed to see the judgment?(No)
2. To be referred to the Reporter or not?(No)
3. Whether the judgment should be reported in the digest?(No)

JUDGMENT

P.K.BHASIN, J:

By this petition the legal representatives of one Mr. Sudhir Chona, who was one of the defendants in suit for recovery filed by the respondent no. 1, seek to invoke the

jurisdiction of this Court under Article 227 of the Constitution of India while assailing the order dated 17.08.2002 passed by the learned Additional District Judge in the case titled as 'Central Bank Of India v. Engineering India & ors.' whereby that suit, which was dismissed in default on 30-09-1991, was restored.

2. Facts leading to the filing of this petition are that the respondent no. 1 herein filed a suit for recovery to the tune of Rs. 3,98,135.85/- along with *pendente lite* and future interest against one proprietorship firm(arrayed as defendant no. 1 in the plaint) and its proprietor(arrayed as defendant no. 2 in the plaint) as principal debtors and one Sardul Singh(defendant no.3) as the guarantor for the loan given to defendants no. 1 and 2. Defendant no. 2 in the suit, who was the proprietor of defendant no. 1, put in appearance in the suit proceedings and had filed written statement also. On 30.09.1991 the suit was dismissed in default due to non appearance of the counsel for the plaintiff bank. By that time the third defendant had not been served. The respondent no. 1 moved an application under Order 9 Rule 9 of Code of Civil Procedure. During the pendency of that application the defendant no. 3 in the suit, the guarantor, expired and so his legal representatives were sent the notice and it appears that only the widow of the deceased appeared in Court after service and contested the application for restoration of the suit. As far as the other two defendants are concerned, there was a report of their refusal to accept the notice of the restoration application and the learned trial Court considered that to be a proper service of notice upon them. Thereafter, the learned

trial Court proceeded to dispose of the restoration application as well as an application under Section 5 of the Limitation Act which had also been filed for condoning the delay in filing the restoration application. Vide order dated 17-8-2002 the learned trial Court restored the suit.

3. It appears that after the restoration of the suit it was brought to the notice of the trial Court by the legal representatives of the deceased defendant no. 3 that the defendant no. 2 Sudhir Chona had also expired. The respondent bank then filed an application for bringing on record the legal representatives of the deceased defendant no. 3. Upon receipt of the notice of that application, it appears, the legal representatives of the deceased defendant no. 2 instead of contesting that application under order XXII Rule 4 CPC straightaway rushed to this Court by filing this petition challenging the restoration of the suit ordered vide order dated 17-8-2002.

4. The main point urged before me during the course of hearing of this petition by the learned senior counsel for the petitioners was that the learned trial Court could not have ordered restoration of the suit without first bringing on record the legal representatives of the deceased defendant no. 2, namely, the petitioners herein, and that in the suit had stood abated before its restoration because of the failure of the plaintiff bank to bring on record the legal representatives of the principal debtor. It was also contended that the learned trial Court was wrong in accepting the report of refusal on the application for the restoration of the suit sent

to defendant no. 2 since there was no occasion for him to have refused to accept the notice as during the relevant period he was admitted in the hospital for some serious ailment due to which he later on died also.

5. In my view, there is no merit in this petition and the same is liable to be dismissed. Since the learned trial Court had accepted the report of refusal of defendant no. 2 to accept the notice of the restoration application it was justified in disposing of that application without any opposition from the side of defendants no. 1 and 2. There was no question of the suit having abated after the expiry of 90 days period from the date of death of defendant no. 2 since by that time there was no suit pending before the trial Court because of its having been dismissed in default. After restoration of the suit the respondent bank had moved an application for bringing on record the legal representative of the deceased defendant no. 2. This Court is not aware whether that application has so far been disposed of or not and if that is still pending the proposed legal representatives would still be at liberty to contest it. However, they cannot get an order from this Court setting aside the restoration of the suit in respect of the claim against their predecessor in interest on the ground that the suit had already stood abated.

7. In the result, this petition is dismissed.

P.K.BHASIN,J

November 5, 2007
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